IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>JESUS ALDANA GUEVARA,<br><br>Petitioner. | ) | 2 CA-CR 2006-0359-PR<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20000646

Honorable Edgar B. Acuña, Judge

REVIEW GRANTED; RELIEF DENIED

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Jill Thorpe — Tucson
Attorney for Petitioner

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E C K E R S T R O M, Presiding Judge.

**¶1** Petitioner Jesus Guevara was convicted after a jury trial of armed robbery, two counts of aggravated assault, fleeing from a law enforcement vehicle, criminal damage, two counts of possession of a narcotic drug for sale, possession of marijuana, possession of drug paraphernalia, possessing a prohibited weapon, and possessing a defaced deadly weapon. In *State v. Guevara*, No. 2 CA-CR 2001-0210 (memorandum decision filed Nov. 26, 2002),

we affirmed these convictions and the concurrent prison sentences imposed on each of them, the longest of which was 10.5 years.

**¶2** Guevara then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., raising claims of ineffective assistance of trial counsel, including allegations that counsel had been under the influence of illegal drugs during Guevara's trial. After an evidentiary hearing at which trial counsel, Guevara, Guevara's mother, and trial counsel's former wife testified, the trial court found "insufficient credible facts" on which to "conclude that trial counsel fell below the prevailing objective standard" of representation. The court further found Guevara had "failed to establish by a preponderance of evidence that trial counsel was ineffective because of alleged intoxication and/or drug abuse at or during the time of trial." *See* Ariz. R. Crim. P. 32.8(c) (requiring defendant to prove factual allegations by preponderance of evidence). Finally, the court found that even if Guevara had established that counsel's performance had fallen below prevailing professional standards, Guevara had not shown he had been prejudiced or "that there was a reasonable probability that but for any unprofessional conduct, the results of the trial would have been any different." This petition for review follows the trial court's denial of post-conviction relief. We review the ruling for an abuse of discretion, *see State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990), but find none.

**¶3** We briefly set forth the facts underlying Guevara's convictions, which arose from the theft of a Chevrolet by a man who drove away in the vehicle immediately after

ordering its two occupants out at gunpoint. The two victims went to a telephone to report the incident. Several minutes later, police officers spotted the vehicle. In the ensuing chase, the vehicle hit a brick and wrought iron fence, a light pole, and a chain link fence before coming to rest against a concrete barrier. Guevara was the driver and sole occupant. A shotgun was found next to the passenger seat, along with a dark jacket. Two forms of cocaine contained in seven different bags, a miniature scale, and $80 cash were found on Guevara's person. One of the victims, Ivan, identified Guevara at the scene of the accident, as well as at trial. The other victim, Sonia, identified Guevara's voice at trial.

**¶4** Guevara testified at trial that on the day of his arrest, a man whom he knew only as "Chongo" had arrived at a "crack house" frequented by Guevara and had offered Guevara the use of the Chevrolet for two hours in exchange for a "20 rock," meaning an amount of crack cocaine worth $20. Guevara agreed to the exchange and drove away in the vehicle, intending to visit someone whom he alternately identified as a "friend" or his "cousin." When he soon thereafter found himself being followed by police, he testified he had fled only because he knew he possessed illegal drugs.

**¶5** To prevail on a claim of ineffective assistance of trial counsel, a defendant must establish not only that counsel's performance was deficient, based on prevailing professional norms, but also that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). More specifically, a defendant must show "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. If either prong of this test is not satisfied, the claim fails. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

**¶6** Guevara asserts the trial court abused its discretion in rejecting the following claims of ineffective assistance of trial counsel, each of which he raised in the post-conviction proceeding below.

1. Trial counsel failed to conduct pretrial interviews of the state's witnesses.

2. Trial counsel failed to move to sever the armed robbery and aggravated assault counts from the drug possession and weapons counts.

3. Trial counsel failed to move for preclusion of the statements Guevara made to police officers at the time of his arrest.

4. Trial counsel filed an untimely motion pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969).

5. Trial counsel was under the influence of illegal drugs during trial.

We address each of these in turn.

**Pretrial Interviews**

**¶7** Trial counsel testified at the evidentiary hearing that he did not "believe" he had conducted pretrial witness interviews but could not recall specifically whether he had done so. He testified he practiced law in both federal and state court, saying that in federal court,

he had become accustomed to preparing for trial without interviewing adverse witnesses and had developed an ability to adequately prepare for trial without doing so. He also stated he had learned that interviewing witnesses sometimes "telegraph[ed] . . . certain things" to the prosecutors, a consequence he sought to avoid by not interviewing "most witnesses." Citing *State v. Radjenovich*, 138 Ariz. 270, 274, 674 P.2d 333, 337 (App. 1983), Guevara essentially claims defense counsel's failure to conduct pretrial witness interviews in this case constituted ineffective assistance as a matter of law. He also contends he suffered prejudice, asserting interviews would have "fleshed out some important points" for his defense.

**¶8** The first of these, he states, is "the delay that occurred between the robbery and when [he] was seen in the vehicle." In support of this claim below, he cited the police department's "incident history," from which he claimed trial counsel could have developed information that approximately twenty-two minutes had elapsed between the victims' 911 call and an officer's spotting Guevara, rather than the approximate ten-minute lapse to which the officer testified at trial. Guevara contended the difference would have made more plausible his story that he had obtained the vehicle from a third party. Guevara's claim, however, was highly speculative and did not establish that pretrial interviews, had they been conducted, would have developed additional evidence with a reasonable probability of changing the verdict. By any measure of time, the evidence would have shown that within less than one-half hour after the victims had reported a man wielding a gun wrapped in a jacket had taken the vehicle, Guevara had led the police on a dangerous chase and had been found in

possession of a shotgun, a jacket, and the vehicle. Sonia testified the jacket was the same type as that which had been wrapped around the gun. In addition to this compelling circumstantial evidence, one victim identified Guevara at the scene of his apprehension, and both victims identified him at trial, one by his appearance, the other by his voice. Under these circumstances, the trial court was within its discretion to reject Guevara's ineffective assistance claim under either prong of the *Strickland* test. "'[P]roof of ineffectiveness must be a demonstrable reality and not merely a matter of speculation.'" *State v. Schultz*, 140 Ariz. 222, 225, 681 P.2d 374, 377 (1984), *quoting State v. Tison*, 129 Ariz. 546, 556, 633 P.2d 355, 365 (1981).

**¶9** The trial court also correctly rejected Guevara's claim concerning "how the description of the robber came about . . . and how the robber was wearing a flannel shirt, rather than the leather jacket found in the vehicle." Guevara implies that if counsel had interviewed Officer Lopez before trial, she "might have remembered the description" the victims had given, which she had been unable to do with precision during the *Dessurealt* hearing. Speculation about what this witness might have recalled during a pretrial hearing is insufficient to establish a "'reasonable probability that . . . the fact finder would have had reasonable doubt [as to] defendant's guilt.'" *State v. Valdez*, 167 Ariz. 328, 330, 806 P.2d 1376, 1378 (1991), *quoting Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068-69 (alterations in *Valdez*). Again, in light of the overwhelming evidence against Guevara, he did not establish a reasonable probability that an interview of Lopez, even if it had produced a conflicting

description of the assailant, would have changed the jury's verdicts on the relevant counts. Given the jury's opportunity to observe Guevara as he testified and judge the credibility of his denial that he had been involved in the incident, we cannot find the trial court committed an abuse of discretion in rejecting this claim.

**¶10** Finally, Guevara implies he was prejudiced by trial counsel's failure to conduct a pretrial interview of Officer Hearn. Hearn testified that, in his opinion, the seven bags of cocaine Guevara possessed had been for sale, not for personal use, because "[m]ost people that use don't have both crack and cocaine. They either use one or the other." Guevara argues this testimony was "critical" to the jury's finding that the drugs had been for sale. Regardless of counsel's competency, the absence of a pretrial interview of this witness could not have prejudiced Guevara on the issue of whether the drugs in his possession had been for sale. Guevara himself testified at trial that the cocaine found on his person had been intended "[f]or use *and for sale*" and that he "used to sell drugs." (Emphasis added.) He also testified he had exchanged a "rock" with "Chongo" for the vehicle's use, that this transaction had occurred at a crack house where the occupant "let[] us sell [drugs] out of his house," and that the $80 found in his possession had consisted of four $20 bills that "could" have been obtained from selling four "20 rocks." Given these statements, we disagree with Guevara that Hearn's testimony was "critical" to the jury's finding he had possessed the drugs for sale. On this record, the trial court could have concluded there was no reasonable probability that, had trial

counsel interviewed Hearn and somehow challenged the testimony to which Guevara refers, the jury would have returned a different verdict on any affected count of the indictment.

**Motion to Sever**

**¶11** Guevara contends the trial court "abused [its] discretion in failing to find prejudice" in trial counsel's failure to move to sever the armed robbery and associated counts against him. We disagree with Guevara's apparent assumption that the trial court found counsel's performance was less than minimally competent but not prejudicial on this issue. The trial court's findings are not so specific as to enable us to discern the precise basis upon which the court rejected this claim. And, trial counsel conceded the charges for drug possession and fleeing from law enforcement in order to enhance the credibility of Guevara's denial that he had committed the more serious charges and provide an alternative explanation for his possession of the vehicle and flight from police officers. Guevara fails to show this tactic was unreasonable. As the state points out, *without* the charges of drug and paraphernalia possession, a jury deciding his guilt or innocence on the remaining charges would have been left with evidence only of Guevara's possession of the recently stolen vehicle, the victim's identification of him as the perpetrator, and his flight from the police. All of these facts would have only supported an inference of guilt. *See State v. Edwards*, 136 Ariz. 177, 186-87, 665 P.2d 59, 67-68 (1983). The trial court did not abuse its discretion in denying Guevara's claim of ineffective assistance of counsel based on the unopposed joinder of the charges.

**Motion to Suppress Statements**

**¶12** Guevara next claims counsel was ineffective in failing to move for suppression of his statement to police, "I just jacked a car, man, I want to talk to my lawyer, will you call him for me," which he contends was an involuntary statement made in violation of his rights under *Miranda*.[1] The state argued below that Guevara was not prejudiced by either portion of the statement or by the absence of any objection by trial counsel when the prosecutor referred to the statement during closing argument. We agree.

**¶13** Even assuming minimally competent counsel would have moved to suppress Guevara's apparent admission that he had stolen the car, Guevara did not demonstrate that but for the admission of these statements or the state's use of them in closing argument, the jury would have found him not guilty on any count. To the contrary, as discussed, the state presented ample, other evidence contradicting Guevara's defense that he did not himself steal the car at gunpoint. The remaining portion of the statement—that Guevara sought to speak with his lawyer—Guevara himself introduced, a tactical decision we give wide latitude. *See State v. Atwood*, 171 Ariz. 576, 600, 832 P.2d 593, 617 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

**Untimely *Dessureault* Motion**

**¶14** Trial counsel filed an untimely motion pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), to suppress all testimony relating to Ivan's identification of Guevara. However, the trial court conducted a hearing on the motion on the first day of trial

[1]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

and denied it, finding that Ivan's pretrial identification of Guevara, although suggestive, was not so unduly suggestive as to taint or require preclusion of Ivan's in-court identification. Although the court did not sanction the untimely filing, Guevara argues "[n]o good tactic can be suggested by [trial counsel]'s action in filing this motion [for a *Dessurealt* hearing] late," an argument we find irrelevant, given the obvious lack of prejudice.

**¶15** He also suggests that a timely filing might have provided counsel an ability to impeach Ivan at trial with his testimony at the *Dessureault* hearing or to "assess" in advance of trial the testimony of any witness who had testified at the hearing. But the trial court need only have found counsel had been minimally competent to have rejected this claim of ineffective assistance. *See State v. Henry*, 176 Ariz. 569, 585, 863 P.2d 861, 877 (1993). In light of the "strong presumption of effective assistance" the trial court was required to apply, *see id.*, Guevara failed to show that a singular breach of a procedural time limit for which the trial court imposed no sanction fell below any prevailing standard of minimal competency.

**Allegations of Counsel's Drug Use**

**¶16** Guevara's final argument challenges the trial court's conclusion he had "failed to establish by a preponderance of the evidence that trial counsel was ineffective because of alleged intoxication and/or drug abuse at or during the time of trial." This conclusion rests solely on the trial court's determination of the credibility of the witnesses and the weight of the evidence, matters that rest within the exclusive province of the trial court in a post-conviction proceeding. Ariz. R. Crim. P. 32.8 (trial court "shall make specific findings of fact" after

conducting evidentiary hearing in post-conviction proceeding). We will not disturb the court's conclusion.

## Conclusion

**¶17** We find no abuse of discretion in the trial court's denial of Guevara's petition for post-conviction relief. We grant review but deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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GARYE L. VÁSQUEZ, Judge